Supreme Court, U.S.
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No. 09-962

In The
Supreme Court of the United States

LaSalle Group Incorporated,
Petitioner,

v.

Trustees of the Detroit Carpenters Fringe Benefit Funds,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF OF THE PETITIONER

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ADDITIONAL CONSTITUTIONAL PROVISION INVOLVED

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

REPLY

I. The Sixth Circuit erred in making findings of fact on issues never addressed by the district court.

Respondents' Opposition Brief ("Oppo. Brief") implies that LaSalle did something wrong to deserve a finding of alter ego status. In fact, LaSalle properly terminated its CBA with the union, and in retrospect, was found to be another union company's alter ego after that termination. The district court found that LaSalle never did anything intentionally to evade any labor law obligations, App. 29a, and the Sixth Circuit did not reverse this finding, App. 2a-14a. Instead, the Sixth Circuit threw out the "intent to evade" requirement. Now, companies like LaSalle that try

hard to comply with the labor laws may inadvertently be alter egos. The Petition should be granted to address this erroneous view of the federal labor laws in the Sixth Circuit.

A. Respondents argue facts before this Court that were rejected as moot in the district court and not fully briefed.

The Respondents' statement of facts, which includes references to "facts" rejected by the district court as moot and re-argued to the Sixth Circuit, reveals the fundamental error in the Circuit Court below. The Sixth Circuit substituted its judgment for that of the district court and reached findings of fact concerning issues (i.e., alter ego) that the district court never fully considered. The procedural history of the dispositive motions in the district court reveals why this occurred.

LaSalle filed its motion for summary judgment on November 16, 2006, asserting that Respondents could not establish alter ego status as a matter of law because LaSalle never intended to evade any preexisting labor obligations. App. 25a; RE.37. LaSalle did not address the seven-factor alter ego test. RE.37. After briefing by the parties, the district court heard oral argument on LaSalle's motion on February 1, 2007. App. 25a.

On January 12, 2007, at the end of the briefing schedule on LaSalle's motion, Respondents filed their own motion for partial summary judgment, arguing that the facts merited a finding of alter ego by applying the seven-factor alter ego test. App. 25a. On March 1, 2007, LaSalle filed a motion for a scheduling

order to set deadlines for briefs on Respondents' motion. RE.55.

Ultimately, the district court never permitted any briefing on Respondents' alter ego motion, so LaSalle never filed a response and was not permitted to present facts that contradicted Respondents' alter ego motion. App. 25a. So LaSalle never addressed or discussed any of the seven alter ego factors. Instead, on July 25, 2007, the district court granted summary judgment in LaSalle's favor, declared Respondents' motion moot, and declared LaSalle's motion for entry of a scheduling order moot. App. 25a. So LaSalle had no opportunity to respond to Respondents' factual claims concerning the alter ego issue in the district court. Instead, the district court expressly rejected Respondents' alter ego argument as moot and never made any factual findings concerning the seven-factor alter ego test. As only Respondents briefed this issue, the district court did not have enough information to resolve the alter ego question.

On appeal, however, Respondents re-argued the "facts" concerning alter ego, even though the district court denied their motion as moot and never made any factual findings for the appellate court to review. So although LaSalle was not able to bring in additional facts to refute Respondents' factual argument because no such facts were contained within the district court record, the Sixth Circuit accepted the Respondents' view of the facts and concluded that a "mountain of evidence" supported a factual finding of alter ego status. App. 8a. Apparently recognizing the one-sided nature of the factual dispute, however, the Sixth Circuit noted: "Our inquiry ... begins with a review of the evidence, largely undisputed, that was supplied at

the summary judgment stage of the litigation." App. 3a. The evidence was "largely undisputed" because the alter ego issue was not fully briefed in the district court. Apparently the appellate court missed the district court's notation that all the dispositive "motions were fully briefed except [Respondents'] motion for partial summary judgment." App. 25a. In reversing summary judgment for LaSalle and ordering that summary judgment be entered for Respondents on the alter ego issue, the Sixth Circuit improperly substituted its judgment for that of the district court and reached findings of fact on issues never fully addressed in the district court.

A determination of alter ego status is a fact-intensive inquiry that district courts, not appellate courts, are equipped to make. "Determination of alter ego status is a question of fact to be reversed only if clearly erroneous." *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 587 (6th Cir.), *cert. denied*, 549 U.S. 1019 (2006) (citing *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 579 (6th Cir. 1986); *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942)). District courts often make alter ego findings only after trial. Because circuit courts are not fact-finders, they simply cannot assess alter ego status in the absence of an extensive trial court factual record concerning these factors. Such a record did not exist in this case because the district court found that Respondents could not get over the "intent to evade" hurdle and never even accepted briefing on Respondents' alter ego motion.

The Sixth Circuit should not have reached any findings of fact. Instead, after deciding that "intent to evade" is no longer required to prove alter ego status in the Sixth Circuit, it should have sent the case back

to the district court for full briefing on Respondents' motion for partial summary judgment, and if necessary, for trial. But because LaSalle was never able to file a response to Respondents' motion, the Sixth Circuit accepted as true the Respondents' "facts" from their motion. Even though an appellate court is an inappropriate forum for reaching findings of fact, the Sixth Circuit decided the factual dispute concerning alter ego status. At the very least, this Court should send this matter back to the lower court with instructions that the parties fully brief the alter ego issue, and that the district court hold a hearing or trial in order to reach findings of fact.

B. Respondents' Brief contains material misstatements of fact.

Respondents suddenly claim that LaSalle and Industrial acted inappropriately before LaSalle terminated its union contract on May 31, 2003. (Oppo. Brief, pp. 15, 17 & 17 n. 6.) Respondents' brand-new claim is a red herring, and no facts exist to support it. Instead, all facts point in the opposite direction. Because the Complaint seeks an audit from June 1, 2003 forward, this case has always concerned Respondents' claim that nonunion LaSalle is the alter ego of union Industrial under Industrial's CBA effective June 1, 2003. RE.1:p.3. Respondents admit that LaSalle had an absolute right to terminate its CBA effective May 31, 2003, and that LaSalle properly did so. RE.45-8:p.3 of 5; RE.37-4.

Prior to filing this lawsuit, Respondents audited LaSalle for the period that LaSalle was a union signatory up to May 31, 2003 and found that LaSalle had paid all requisite fringe benefits and met all its

union obligations. RE.37-7. It found no evidence that LaSalle ever subcontracted carpentry work to a nonunion company in violation of LaSalle's CBA that terminated May 31, 2003, and specifically, no evidence of any improper subcontracting to Industrial before it became a union signatory. RE.37-11:p.4 of 5. Contrary to Respondents' ridiculous claim that "LaSalle and Industrial were alter egos for two years" prior to June 1, 2003 (Oppo. Brief, p. 17 n. 6), no court ever found that LaSalle and Industrial were alter egos before Industrial signed its union contract effective June 1, 2003. App. 1a-14a, 24a-30a.

Respondents' Brief contains too many material misstatements of fact to address in this short reply. However, several bear noting. Respondents falsely claim that Industrial was created in order for LaSalle to avoid its CBA obligations. (Oppo. Brief, p. 15.) In fact, the district court found that Respondents "failed to present any evidence to show that Industrial was formed or operated with the intended purpose of evading any of LaSalle's preexisting contractual obligations." App. 29a. The Sixth Circuit did not reverse this factual finding.

Industrial was formed in 2001, two years before LaSalle properly terminated its union contract. App. 5a, 25a. Industrial signed a union CBA in 2003. App. 5a, 25a. No change in corporate form occurred in 2003 or thereafter; instead, LaSalle lawfully terminated its union contract and Industrial subsequently entered into its CBA. App. 4a-5a, 25a. LaSalle had no obligations to avoid after May 31, 2003, but instead, it properly terminated its NLRA §8(f) contract. The "change in structure" requirement for finding that one entity improperly changed its corporate form to evade

union obligations does not include one entity's lawful termination of a §8(f) contract and another entity's subsequent execution of a union contract.

Respondents' "facts" stated on p. 17 of its Opposition Brief are actually fiction. They cite to no evidence in the record for their preposterous allegation that LaSalle "was aware that it was an obvious alter ego" because no evidence has ever been alleged or found concerning this claim. Incredibly, Respondents deny that LaSalle terminated its union contract, which is patently false. Respondents admitted that LaSalle had the right to terminate this contract and that it did so effective May 31, 2003. RE.45-8:p.3 of 5; RE.37-4. And both the district court and the Sixth Circuit agree that LaSalle's union contract was terminated effective May 31, 2003. App. 4a-5a, 25a.

II. The Petition should be granted because the errors by the Sixth Circuit are so manifest.

A. A predecessor corporation cannot be an alter ego of a successor corporation.

Respondents conceal the real issue here: that the Sixth Circuit found the *predecessor* corporation (LaSalle), which properly terminated its union contract, to be the alter ego of the *successor* corporation (Industrial), which joined the union after LaSalle terminated and which fully complied with all its union obligations. The Pension Fund Respondents want to hold nonunion LaSalle responsible for fringe benefits of nonunion subcontractors' carpentry employees. But after LaSalle properly terminated its contract, it stopped using union carpentry subcontractors for its nonunion Projects. LaSalle

honestly believed it was nonunion; even the district court found that LaSalle never intended to evade any union obligations. App. 29a. The Sixth Circuit did not reverse this factual finding.

LaSalle found no other case where a court has held a predecessor company responsible for a successor company's union obligations. Essentially, the Sixth Circuit has written "lawful termination" out of §8(f) of the LMRA. In the Sixth Circuit, nonunion contractors can no longer safely contract with union subcontractors – even on nonunion Projects – for fear that they later may be found illegal alter egos. The chilling effect of the Sixth Circuit's decision will be disastrous to unions and their members in the construction industry in Michigan and Ohio.

B. The Sixth Circuit improperly assumed the district court's role as fact-finder.

Respondents' Opposition Brief assumes that the Sixth Circuit is using the correct alter ego standard. But the fact-intensive alter ego inquiry that they reference is inconsistently applied and results in non-uniform application of the federal labor laws. For example, Respondents admit that the alter ego inquiry is fact-intensive, yet support the Sixth Circuit's reversal of the district court, which found no alter ego status. As a result, attorneys can no longer advise construction companies in the Sixth Circuit how to terminate a §8(f) union contract properly because courts in this circuit can either follow *Trustees of the Resilient Floor Decorators Ins. Fund v. A&M Installations, Inc.*, 395 F.3d 244 (6th Cir. 2005) (proof of intent to evade plus seven alter ego factors) or the Sixth Circuit below in *Trustees of the Detroit*

Carpenters Fringe Benefit Funds v. Industrial Contracting, LLC, 581 F.3d 313 (6th Cir. 2009) (new "mountain of evidence" standard with no analysis of the seven alter ego factors and no consideration of intent to evade).[1] Unfortunately, attorneys will end up advising clients to set up corporations outside of Michigan and Ohio, in a circuit that is friendly to employers.

At the Sixth Circuit level, whether a district court's decision concerning alter ego will be upheld on appeal now depends upon whether the reviewing panel decides to follow the earlier-decided *Resilient Floors* case or the later decided *Carpenters* case (which attempts to limit *Resilient Floors* to the parties in that case). To assist both unions and employers, this Court should grant this Petition and set a definitive standard so that everyone involved can predict what behavior is lawful.

Respondents claim that "[t]he Fifth, Seventh, Eighth, and Ninth Circuits would find intent to evade union obligations in the LaSalle/Industrial operations." (Oppo. Brief, p. 27.) But this argument reveals the problem with the entire alter ego analysis that the Sixth Circuit performed. The question should not be whether the circuit courts would find intent to evade (as they are not triers of fact), but whether the circuit courts would find that the district court below erred in finding no intent to evade in this case. Even the Sixth Circuit did not reverse the district court's finding that

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[1] Respondents never even mention the decision in *Trustees of the Resilient Floor Decorators Ins. Fund v. A&M Installations, Inc.*, 395 F.3d 244 (6th Cir. 2005), which the district court relied upon.

LaSalle and Industrial did not intend to evade any preexisting labor obligations; instead, it decided that proof of intent to evade is no longer required to establish alter ego.

Respondents also claim that "[a]ll of the Circuit Courts apply the *Southport Petroleum* standard." (Oppo. Brief, p. 31.) In fact, as stated in the Petition, the circuit courts all cite to *Southport Petroleum*, but they do not actually use it. Instead, they whittle away at its requirements and apply their own alter ego standards. Because this Court has not accepted a petition for certiorari in a union alter ego case in thirty-six (36) years (despite at least five petitions for certiorari on alter ego issues from 1983 to 2007), the circuits have been permitted to carve out their own conflicting standards. Unfortunately, this Court has declined to step in to correct the obvious circuit splits and improper application of the rules it established in *Southport Petroleum Co. v. NLRB,* 315 U.S. 100 (1942), and *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.,* 417 U.S. 249 (1974).

Respondents focus on the "intent" factor, even though the Sixth Circuit did not reverse the district court's finding that LaSalle did not intend to evade preexisting union obligations by creating a new company. App. 29a. In doing so, Respondents demonstrate the error in reasoning that many courts make; namely, they ignore the "disguised continuance" requirement set forth in *Southport Petroleum.* Nowhere do Respondents cite to *Southport Petroleum*'s explanation that the "disguise" in "disguised continuance" means a "disguise intended to evade" the labor laws. *Southport Petroleum,* 315 U.S. at 106. If LaSalle and Industrial did not cause a "disguise

intended to evade" labor obligations, then one company cannot be the disguised continuance of the other.

Finally, Respondents essentially conclude that LaSalle and Industrial would be found alter egos in other circuits. As Respondents cite very little additional law (and no recent decisions) from the circuits on alter ego, LaSalle stands by its Petition. LaSalle would not have been found Industrial's alter ego in any other circuit, as no other circuit has found a predecessor corporation to be the alter ego of a successor corporation and bound to the successor's CBA.

III. The Sixth Circuit's decision violates the due process clause.

Respondents' brief reveals another problem with a circuit court's attempt to rewrite the labor laws. Congress has said that double-breasting is legal (Petition pp. 21-22), but the Respondents cite to the Sixth Circuit's decision below for the proposition that double-breasting is now illegal. (Oppo. Brief p. 15.) Respondents make no response to LaSalle's statement of the current law in which Congress specifically refused to outlaw double-breasting.

If Congress tomorrow passes a law stating that double-breasting is now illegal, it would have an effective date by which construction companies would have to alter their behavior to comply with the new law. Such a law would likely pass constitutional muster under the Fifth Amendment's due process clause. Unfortunately, when the circuit courts declare double-breasting illegal, construction companies have no opportunity to alter their behavior to comply with

the new law. Suddenly, everything they did in the past is open to scrutiny in retrospect because one court in their circuit decided to interpret the labor laws in a new and different way than it had been interpreted for years. Because there is no "effective date" for the new interpretation, the law is changed in retrospect. The result is a violation of the due process clause to the U.S. Constitution. U.S. Const. amend. V.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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